SC84679

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEREMIAH W. (JAY) NIXON,
AND
CARROLL COUNTY TRUST COMPANY,

Relators,

v.

THE HONORABLE JOHN R. HUTCHERSON,
Retired, Circuit Judge, 8th Judicial Circuit, Ray County,

Respondent.

Additional Relator Carroll County Trust Company's Brief in Support of Petition for Writ of Prohibition

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Mo. Const. Art. V § 4.1

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§ 94.05 RSMo (2000)

JURISDICTIONAL STATEMENT

This petition arises out of an order issued by the Honorable John Hutcherson, Circuit Court of Ray County. This order certified a class of alleged plaintiffs represented by Plaintiffs Hall, Carr and Gilbow. The class plaintiffs claim breaches of trust by Carroll County Trust Company, trustee of the Axtell Trust, with regard to the portions of the trust referring to the stock ranch and educational fund.

In a related case before the Honorable Judge Hutcherson, an individual plaintiff, Lucille Palmer, claims breaches of trust by Carroll County Trust Company, trustee of the Axtell Trust, with regard to the lifetime income she is to receive under the terms of the trust and further seeks an accounting of the trust.

Attorney General Jeremiah W. "Jay" Nixon sought a writ from the Missouri Court of Appeals, Western District, prohibiting the respondent from abusing his discretion in certifying the class and proceeding to hear the case as a class action, and directing the dismissal of the claims of class plaintiffs Hall, Carr and Gilbow. The Court of Appeals denied the petition in prohibition. Relator Attorney General then sought a writ from this court. Thereafter, Carroll County Trust Company was added as an Additional Relator pursuant to its motion. This court has jurisdiction to issue an original writ in prohibition, Mo. Const. Art. V, §4.1 and §530.020, RSMo 2000.

STATEMENT OF FACTS

Carroll County Trust Company ("CCTC") was an original party defendant in the case of William J. Hall et al., v. Carroll County Trust Company, et al., Case No. CV399-63CC2.

CCTC hereby incorporates the Last Will and Testament of Mary Catherine Axtel, Deceased, Estate No. 466 (the "Will").

The Will included a trust established by Decedent with provision for the disposition of her residuary estate to benefit Carroll County Trust Company ("CCTC") "[i]n trust only," for the benefit of others as follows: "I will and direct that said Trustee is empowered to enforce said Trust by allowing all said Trust real estate in Missouri to remain as a part of my Estate and real estate in the State of Texas be sold….[a]ny accumulated funds above costs and maintenance and reasonable compensation for said Trustee to be used for the higher education of capable children of Ray and Carroll Counties, Missouri, especially those whose parents are unable, financially, to provide such education…."

The Will further states, in part:

> I further will and direct that said Trust shall extend for a period of (20) years following the survivor of the said Frank C. Bush and Cora Bush, his wife, Virginia Jones, Paul Davis and Jenny Davis, his wife, and Frank Palmer, and Lucille Palmer, his wife, and I do direct that upon expiration of the said (20) years following the death of the survivor, my said Trustee shall pay out

the residue of said Trust estate for the same purpose as hereinbefore stated to such capable children as are selected by my said Trustee in such amounts as my Trustee deems advisable.

It is my will that the farm in Sections Twenty-four (24) and Twenty-five (25) Township Fifty-three (53) and Range Twenty-nine (29), all in Ray County, Missouri, or any additional part thereof, should be used for the purpose for which it was purchased; to begin as a stock ranch with future development, as funds become available, and to a boarding ranch for children ranging in age from five (5) years to twelve (12) years, inclusive, for the express purpose of their entertainment and farm life education.

Any personal property, wheresoever situated, that are usable at the boarding ranch hereinbefore mentioned, is to be retained, moved there and used…

Any accumulated funds above cost of maintenance and reasonable compensation for said Trustee to be used for higher education of capable children of Ray and Carroll Counties, Missouri, especially those whose parents are unable, financially, to provide such education.

After payment of specific bequests for a total of Four Dollars ($4.00) to relatives of Decedent, it was provided that:

> …from the income of my farm in Moss Creek, Trotter, and Egypt Township, or accumulated cash therefrom…to: Virginia Jones of 112 East Second Street, New York, New York, my aunt; Frank Bush of Fairview, Oklahoma, my uncle and his wife, Cora (to share jointly); Mr. and Mrs. E. Paul Davis (Janie), my friends (138 S. Glenwood, Fairmount Station, Kansas City, MO) (to share jointly) and Mr. and Mrs. Frank (Lucille) Palmer of 308 Fairfield Road, North Sacramento, California, my friends (to share jointly), to receive equal shares of the funds remaining after necessary expenses, such as maintenance, repairs and taxes on both farms, and reasonable compensation to said Trustee, etc., has been allowed. Same shall continue for their lifetime and the lifetime of the survivor of them.
>
> It is my will and I do direct my said Trustee that after the death of the survivor of the said Virginia Jones, Frank C. and Cora Bush, his wife, E. Paul Davis and Janie Davis, his wife, Frank Palmer and Lucille Palmer, his wife, that said Trustee shall thereafter pay the net income from said Trust property to and

(sic) endowment fund to be used for the higher education of capable children of Ray and Carroll Counties, Missouri.

Thereafter, CCTC did not immediately begin to operate the Ray County, Missouri property as a "stock ranch."

CCTC has not yet operated any other properties in Ray County, Missouri as a boarding ranch for children. CCTC has not taken income from the sale of the property in Texas and provided financial assistance for the academic interests of children from Ray and Carroll Counties, Missouri.

Of the above-named Beneficiaries of the Trust, Virginia Jones, Frank C. Bush, Cora Bush, E. Paul Davis, Janie Davis, and Frank Palmer are all deceased. The only living Beneficiary of the Trust is Lucille Palmer, though several of the above-named Beneficiaries of the Trust have direct survivors who are still living.

During the administration of the Decedent's probate estate, Carroll County, Missouri Probate Court, Estate No. 466, the real estate interest of the Decedent in the following tract of real estate was sold and conveyed, to wit: Northwest quarter (1/4) of the northwest quarter (1/4) of Section Four (4), Township Fifty-two (52), north Range Twenty-five (25) west in Egypt Township, Carroll County, Missouri.

Plaintiffs filed their First Amended Petition (Ray County Case No. CV399 63CC) on or around March 15, 1999, which inter alia alleged that Defendant CCTC had violated its duties under the Trust and further provided an extensive list of several children of Carroll and Ray Counties who seek to be certified as a class and then to be declared beneficiaries of the Trust in order to collect residuary

income from the same for their use. (Said First Amended Petition is contained in the Court's record.)

CCTC received and responded to multiple sets of written discovery from Plaintiff and other defendants and in response produced several pages of documents. CCTC then propounded multiple sets of discovery upon plaintiffs and other defendants.

On or around January 13, 2000, the plaintiffs filed their Motion to Certify as class action the action in this case. (A copy of said Motion is contained in the Court's record.) Thereafter, notice was given for a hearing on this motion for October 28, 2000 at 2:00 p.m. CCTC, as well as Attorney General Jay Nixon, submitted Suggestions in Opposition to the plaintiffs' motion to certify as a class action.

In an Order dated March 23, 2002, Judge Hutcherson specially sitting in the Circuit Court of Ray County, Missouri granted Class Action status to Plaintiffs Hall, Carr and Gilbow (the "Order"). (A copy of said Order is contained in the Court's record.)

On or around May 7, 2002, Terence G. Lord, Clerk of the Missouri Court of Appeals, acknowledged the receipt of CCTC's Notice of Appeal from the Order. (Docket No. WD61317.) On or around May 30, 2002, Larry Kohrs Kelly, Staff Counsel to the Missouri Court of Appeals, requested that appellants file Suggestions as to why CCTC's appeal should not be dismissed pursuant to Rule

74.01(b) on or before June 7, 2002. On or around June 7, 2002, Appellants filed Suggestions in Opposition to Dismissal of Appeal.

In an Order dated June 20, 2002, Paul M. Spinden, Chief Judge of the Missouri Court of Appeals, Western District, dismissed the appeal because it appeared to have been "taken from an Order that is neither final nor otherwise appealable pursuant to Section 512.020 R.S.Mo. 2000 and Rule 74.01." (A copy of said Order is contained in the Court's record.)

Thereafter, the Attorney General for the State of Missouri, Jeremiah W. ("Jay") Nixon, filed a Petition for Writ of Prohibition with the Missouri Court of Appeals for the Western District, seeking to prohibit Judge Hutcherson from certifying the class action due to lack of jurisdiction over the issue because plaintiffs did not have standing. (Docket No. 61639).

The writ sought to prevent the trial Judge from proceeding with this action and certifying the plaintiffs as a class.

On July 22, 2002, presiding Judge Paul M. Spinden of the Missouri Court of Appeals for the Western District in the case entitled State ex rel Jeremiah W. ("Jay") Nixon, Attorney General Relator v. Hon. John R. Hutcherson, Retired, Circuit Judge, 8th Judicial Circuit, Ray County, Respondent, W.D. 61639, entered an Order denying the Writ of Prohibition. The Honorable Edwin A. Smith concurred. On August 7, 2002, the Attorney General's office appealed this denial to the Supreme Court of the State of Missouri.

On August 13, 2002, CCTC filed a motion to intervene as an additional Relator in this matter.

On or around August 11, 2002, the Supreme Court entered the following order: "Carroll County Trust Company granted leave to join as additional Relator." (A copy of said Order is contained in the Court's record.)

On or around August 27, 2002, the Supreme Court of Missouri sitting en banc issued a Preliminary Writ of Prohibition (the "Writ") which prohibited the Honorable John R. Hutcherson, Circuit Judge, Eighth Judicial Circuit, Ray County, from certifying the putative class action in the underlying action herein. (A copy of said Writ is contained in the Court's record.)

The Writ required that the Honorable John R. Hutcherson, Circuit Judge, Eighth Judicial Circuit, Ray County, show cause as to why the Writ should not issue ordering him to vacate his order certifying the class.

On September 26, 2002, the Respondent filed his Answer in Opposition to Writ of Prohibition. This brief supports the original Writ of Prohibition on behalf of Additional Relator CCTC.

POINTS RELIED ON

I.

Respondent misinterprets the case law in the State of Missouri as to the rights of a private individual or group of private individuals to enforce a public charitable trust versus those of the Attorney General.

*Dickey v. Volker***,** 11 S.W.2d 278 (Mo. 1928)

Volker v. St. Louis Mercantile Library Assn., 359 S.W.2d 689, 695 (Mo. 1962)

II Perry on Trusts (6th Ed.), S. 732

II.

Respondent's reliance on RSMo §532.020 was misguided.

RSMo §352.240

*Dickey v. Volker***,** 321 Mo. 235, 246, 11 S.W.2d 278 (Mo. 1928)

III.

The pleading of the *cy pres* doctrine does not give plaintiffs class action standing.

*Dickey v. Volker***,** 321 Mo. 235, 246, 11 S.W.2d 278 (Mo. 1928)

STANDARD FOR PROHIBITION

CCTC joins the Relator Jeremiah W. "Jay" Nixon in arguing the following:

Prohibition is a means to prevent usurpation of judicial power and confine inferior courts to their proper jurisdiction. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986); *see also State ex rel. Kerns v. Cain*, 8 S.W.3d 212, 214 (Mo. App. W.D. 1999). In this case, the circuit court exceeded its jurisdiction when it certified a class of plaintiffs represented by Hall, Carr and Gilbow. The class plaintiffs do not have standing to assert their claims. Moreover, even if they had standing, their claims are not ripe and they cannot satisfy the requirements for class certification in Rule 52.08. Therefore, the circuit court acted outside the scope of its jurisdiction and prohibition is proper. *Birdsong et al. v. Adolf*, 724 S.W.2d 731, 732 (Mo. App. E.D. 1987).

There are two prerequisites for a writ of prohibition. *Lohman v. Personnel Advisory Bd.*, 948 S.W.2d 701, 703 (Mo. App. W.D. 1997). First, there must be a lack of an adequate remedy at law. *Id*. Here, there is no opportunity of a timely appeal.

Because Rule 52.08 of the Missouri Rules of Civil Procedure is identical to Rule 23 of the Federal Rules of Civil Procedure, we can consider federal precedent. *Ralph et al. v. Am. Cablevision of Kansas City, Inc.*, 809 S.W.2d 173, 174 (Mo. App. E.D. 1991). "[A]n order either granting or denying the certification of a class is not a 'final decision' within the meaning of 28 USC §1291 that would authorize an appeal to the Eighth Circuit as a matter of right."

Wilson et al. v. Am. Cablevision of Kansas City, Inc., 130 F.R.D. 404, 406 (W.D. Mo. 1990). This is because these orders do not terminate litigation. *Id*. If the judge denies certification at the outset, or during litigation decertifies a class, the plaintiffs can proceed as individuals. If the class is certified, the matter continues as a class action. None of these rulings terminate the litigation. Because the circuit court's order certifying the class is not a final judgment for the purposes of appeal, those opposing class certification must proceed through a trial before testing the rights of the named plaintiffs to even assert a claim.

A later appeal is not an adequate remedy. While the relator could appeal the issue of class certification at the end of the litigation, it would be a waste of scarce judicial resources. *State ex rel. State of Missouri, Dep't. of Agric. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985). Waiting until the end of litigation to appeal class certification would leave the relator open to a case with "burdensome discovery" as well as a trial. *Id.* Such would also be a waste of CCTC's financial resources and would needlessly harm its owners when the Court was acting outside of its jurisdiction. The relator should not have to burden himself with an appeal at the end of a trial simply because the trial court acted beyond its jurisdiction. Relator has no adequate remedy at law and the writ should be issued.

Second, in order for a writ of prohibition to lie, there must be the absence of jurisdiction in the tribunal before which the underlying matter is pending. *Id.* Class plaintiffs had no standing to bring their claims. Moreover, even if they did have standing, the claims are not ripe and they cannot satisfy the class certification

requirements in 52.08. Thus, the circuit court had no jurisdiction to grant the order certifying the class. Therefore, the writ is appropriate. Additional Relator CCTC has satisfied both requirements for a writ of prohibition and the writ should be issued.

ARGUMENT

I.

Under the Missouri Rules of Civil Procedure, a respondent to a writ of prohibition has a prescribed amount of time to show good cause as to why the writ should not be made permanent. RSMo §94.05. The Writ required that Judge Hutcherson show cause as to why a permanent writ should not be issued. (See copy of Writ contained in the Court's record.) Respondent has failed to show good cause as to why the writ of prohibition should not be made permanent.

II.

In Section I of its Answer, Respondent initially contends that *Dickey*

v. Volker, 11 S.W.2d 278, has been misinterpreted by the Missouri Supreme Court in its granting of the Writ of Prohibition. In *Dickey*, the court, from the very outset, sets forth the standard or traditional rule for the enforcement of trusts which inure to the charitable benefit of an indefinite number of beneficiaries by stating that "[I]n this country, the people as guardian enforce them [charitable trusts] in the equity courts by their Attorney General and an individual member of the public **has no vested interest in the property or funds of the trust**." *Dickey***,** *321 Mo. 235, 246, 11 S.W.2d 278 (Mo. 1928) (emphasis added)*. This holding is considered the traditional rule as admitted by the Plaintiffs. *See Plaintiffs' Answer to A Writ of Prohibition §II*.

Predictably, the holding in *Dickey* has since been solidified, if not expanded. *See Volker v. St. Louis Mercantile Library Assn., 359 S.W.2d 689, 695 (Mo. 1962).* In *Volker*, the court was addressing a suit brought by members of a public charitable corporation to cancel a lease. *Volker, 359 S.W.2d at 689*. In its discussion, this Court took the opportunity to discuss several cases, including *Dickey*, from its jurisprudence involving charitable trusts. "*Dickey*…involved a trust for the public generally and held that any action for the mismanagement or misuse of trust funds 'must be taken by the Attorney General as representative of the public.'" *Volker at 695.* The court goes on to quote *Dickey*:

> In common with other members, he [member of public] has an interest in the charitable use. He has no right of action for the mismanagement or misuse of the fund. Any action on this account must be taken by the Attorney General as a representative of the public. However, those with a special interest may enforce the trust, or a group charity may be enforced by a class suit. In such suits, it is proper and often necessary to make the Attorney General a party defendant.

Dickey at 246, 247.

The Respondent rests its required showing of good cause upon the final two lines of the above quote. That is, the Court's allusion that a party with a special interest may enforce the trust, or a group charity may enforce the same by a class suit. These alleged "exceptions" to the traditional rule, even if valid and judicially accepted exceptions, do not apply to these Plaintiffs. First and foremost, this

language does not save Respondent's cause because there is no special interest and no group charity. Not one individual has been selected to receive benefits of this trust and therefore, no special interest has been vested in anyone. Further, there is absolutely no charity in existence which may enforce the trust through a class action. None of the plaintiffs would fall within the alleged exception.

To illustrate this concept, the *Dickey* court points out examples of what types of special interest or groups would be able to benefit from this exception to the traditional rule.

> [B]ut where a gift is not a public charity, but is to a school that is not free and open to the general public, the Attorney General cannot maintain an information or bill. So, if there is a gift or dedication for a church or meeting-house, to be owned by the church, parish, society or by pew-holders who have [a] vested right and can sue, the Attorney General cannot sue in his official capacity, unless the gift is so public and indefinite that no individuals or corporations have the right to come into court for redress.

Dickey quoting II Perry on Trusts (6th Ed.) S. 732.

As this paragraph from the treatise relied on by this Court points out, the rule allowing parties other than the Attorney General to enforce a charitable trust only applies when the gift is not to an undefined public charity but is to a school, church or other defined private charity who therefore has a vested right. In this

case, it is clear by the expressed terms of the charitable trust relied upon by all parties, that the charitable trust does not have a specific private organization intended as a beneficiary but is instead public and indefinite. There is no school, church, charity or other special interest which can bring its own suit into court in order to redress what it believes to be an abuse or mismanagement of the trust. There is a broad group of citizens from a couple of counties who may or may not be eligible. Thus, the Attorney General is the proper party to enforce.

The lineage of the traditional rule of law is discussed by the *Dickey* court when it cites *Association for Relief of Females v. Beckman, 21 Barb. (N.Y.) 565, 568, 569*, which dealt with a similar situation to the case at bar, i.e., an action for the actual establishment of a trust for charitable uses and execution thereof. That court held:

> The theory of the complaint is, that the testator, by his will, devoted the bulk of his estate to charity, and tied the trustees appointed by him to that purpose, and those to whom the administration of the estate has been committed, have failed to carry his intentions into effect.
>
> ***
>
> Where the trust is for a public charity, there being no certain persons who are entitled to it, so as to be able to sue in their own names as *cestuis que* trust, a suit for the purpose of having the charity duly

administered must be brought in the name of the Attorney General.

(emphasis added)

To restate, plaintiffs do not have a vested interest in the trust and therefore cannot enforce it. *Dickey at 257.* That is, plaintiffs have never proven to be ones who would fall within the parameters of the undefined beneficiaries who have a vested right to enforce it and they certainly have never been appointed or selected to be in this group. Moreover, Respondent admits that there is no named party which can be considered a public charity. See Respondent's Answer in Opposition to the Writ of Prohibition. Rather, this bequest by Axtell is made to beneficiaries who are "so public and indefinite that no individuals or corporations have the right to come into court for redress." *Dickey at 257*. The result is a public charitable trust which can only be enforced by the Attorney General.

The *Dickey* court, and all subsequent Missouri Appellate courts, propound the philosophy that a public charitable trust is of the public concern and the Attorney General is the protector of interest of the public and therefore is the proper party to bring suit in order to enforce the same. In fact, "the Attorney General is the only one who can properly invoke the superintending power of the courts over the administration of such trust." *Id.* The *Dickey* court found that the Attorney General holds the absolute preclusive right to sue upon behalf of persons who are *cestui que* a public charitable trust. Thus, any private class action is wrongfully before the court and the writ of prohibition was properly issued.

III.

In Section II(A) of its Answer, Respondent alleges that a certain "traditional" rule addresses only charitable trusts established under RSMo § 352.240 and would not apply to CCTC.[1] Respondent argues that §352.240 is implicated, or rather not applicable, in the immediate case. That is, Respondents claim, the statutory bar prohibiting suits against charitable corporations has a negative aspect which makes it legal to sue those corporations which are trustee of a charitable trust but are not incorporated as a charitable corporation under this statute. Respondent apparently further alleges that this implication removes the standing requirement in a civil case. CCTC has never claimed protection under §352.240 and further submits that this statute does not affect the standing requirement in Missouri courts.

Respondent, as well as CCTC, cannot point to any law which changes the well-established law discussed in Section II, *supra,* that limits the standing to

[1] Respondent fails to give a citation to this rule, although we believe it to be the rule set out in *Dickey at 246, 247*. Respondent also cites what is ostensibly a Missouri case which is on point merely as "Hinton." CCTC is in the unenviable position of attempting to address the rules and cases Respondent believes support its position without the slightest hint as to what they are. Nonetheless, CCTC will attempt to address Respondent's position, which seems to be that the generally accepted rule prohibiting a private party from suing to enforce a public charitable trust does not apply in the instant case.

enforce charitable trusts with undefined beneficiaries to the Attorney General. There is simply no law or *stare decisis* which changes the standing requirement depending on whether the trustee is incorporated as a charitable corporation under this statute or not. §352.240 merely protects charitable corporations established under its prescription. It does not state that private parties with no vested interest in a public charitable trust may sue to enforce the trust. To find otherwise would be to expand this law of corporations into the Code of Civil Procedure and beyond.

IV.

CCTC concedes that generally any party in an action on a trust may plead the doctrine of *cy pres.* The pleading of this doctrine does not, however, give standing to a party which does not have standing such as the putative class in the class action discussed herein. As addressed *supra*, the putative class action neither has a special vested interest nor is an existing charity which may seek to enforce certain terms of a trust through a suit in his/her own name or a class action. *Dickey.* The fact that this putative class sought, as part of its action, the invocation of the doctrine of *cy pres* does not overcome this limitation and the fact that a public charitable trust may only be enforced through an action by the Attorney General, and therefore the issued writ of prohibition must be made permanent.

CONCLUSION

The well-established case law of the State of Missouri holds that a public charitable trust, such as the one at issue in the instant case, may only be enforced by the Attorney General as representative of the general public. *Dickey at 246, 247.* The small exception allegedly noted in the *Dickey* decision is that when either a party has a special interest in the charitable trust or it is an existing charity, it may attempt to enforce the terms of the trust through a private civil suit. *Id.* Plaintiffs fall into neither category. There is no special vested interest because no individual or group has been determined to be a member of the undefined beneficiary class. Furthermore, there is no existing charity named in the will which may enforce the trust through a class action. The traditional rule bars the standing of Respondents.

Plaintiffs wrongfully rely upon R.S.Mo. §352.240 for the proposition that the protection of this statute would not apply to a for-profit corporation which is trustee of a public charitable trust. CCTC makes no such contention and does not seek the protection of this statute. Instead, CCTC points to the overwhelming case law that it is protected by traditional rule, and Plaintiffs do not fall into either alleged exception to this rule. The traditional rule is not limited to apply only to charitable corporations incorporated by R.S.Mo. §357.240. The Respondents have no standing.

Finally, Plaintiffs contend that any party can request the *cy pres* of a charitable trust. Again, CCTC does not dispute this. It only states that merely

pleading the doctrine of *cy pres* will not save a flawed class action which may not maintain an action against a public charitable trust due to lack of standing.

For the above reasons and in response to Plaintiffs' Answer in Opposition to this Court's Writ of Prohibition, CCTC states that Plaintiffs have not shown good cause as to why the issued writ of prohibition should not be made permanent.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,482 words, excluding cover, this certification, and signature block, as determined by Microsoft Word software;

2. That the attached brief includes all the information required by Supreme Court Rule 55.03;

3. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

4. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of November, 2002, to:

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